United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

74-2062

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

INTERSTATE COMMERCE COMMISSION, Plaintiff-Appellee,	)	
and	)	
ETHAN ALLEN, INC., VERMONT PUBLIC SERVICE BOARD and NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, Intervenors	)	No. 74-2062
vs.	)	
MAINE CENTRAL RAILROAD COMPANY Defendant-Appellant.	)	

On Appeal From The United States District Court
For The District of Vermont

BRIEF FOR INTERVENOR-APPELLEE ETHAN ALLEN, INC.

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September 24, 1974

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BRIEF FOR INTERVENOR-APPELLEE ETHAN ALLEN, INC.

The brief of Defendant-Appellant Maine Central Railroad Company raises three issues. These issues will be answered here in the order in which they are treated in Maine Central's Brief.

I

Maine Central Abandoned Operation of the Segment of Line Here Involved

Section 1(18) of the Interstate Commerce Act

prohibits a railroad from abandoning "the operation" of any part of its line without the permission of the Interstate Commerce Commission. There is no question that Maine Central ceased operation of the line here involved and that the Commission had not given Maine Central permission to do so. There is therefore an unlawful abandonment.

Maine Central seeks to avoid this conclusion by construing the law to mean that there is no abandonment because (1) the segment is not physically capable of being operated until it is rehabilitated, and (2) permission to abandon has been requested of the Commission. This is not the law. Certainly, so long as a railroad is financially and physically able to restore a segment to operating condition, it must do so. In fact, two cases have gone so far as to hold that an abandonment may result even where the railroad, arguably, lacked the financial resources to restore the segment to operating condition. ICC v. St. Johnsbury & Lamoille County Railroad (D. Vt. Cir. 73-3, 1973); Myers v. Jay Street Connecting Railroad, 259 F. 2d 532 (2d Cir. 1958).

The Court below found that Maine Central is "financially solvent", and that it "realized a profit in the past several years of operation and has sufficient

manpower to effect the necessary repairs". Actually, even if this were not the case, Maine Central would still be able to rehabilitate the segment. Intervening plaintiff Ethan Allen, Inc., the segment's principal customer, has offered to pay the $52,000 which Maine Central estimates to be the cost of rehabilitation; and the order appealed from specifically requires Ethan Allen to do so. Accordingly, the only expense to be incurred by Maine Central is the cost of operating the segment during the period between rehabilitation and Commission disposition of Maine Central's abandonment application.

The pendency, before the Commission, of an abandonment application does not prevent cessation of operations from constituting an unlawful abandonment. Until the Commission grants an application, no cessation is lawful. Maine Central seeks to condone its behavior by characterizing it as "a conditional suspension of service" (Brief, p. 14). Section 1(18) of the Act has no such category. Unless Maine Central is acting to rehabilitate the line and restore service thereon

it has abandoned operation and is in violation of the Act.

II

The District Court and not the Commission Had Jurisdiction to Require Resumption of Service

The vehicle by which Maine Central's abandonment has been effected is an embargo. In general, the Commission has jurisdiction over embargoes, and Maine Central argues that the Commission and not the Court has jurisdiction to prevent the abandonment here alleged. This obviously is fallacious. Calling an unlawful abandonment an embargo does not change its nature. Nor can such semantics alter the language of Section 1 of the Act which expressly empowers the Court to enjoin an unauthorized abandonment. This was expressly recognized in ICC v. St. Johnsbury & Lamoille County Railroad, supra.

Moreover, the Court of Appeals for the 8th Circuit recently rejected an argument identical with that advanced

here by Maine Central. ICC v. Chicago, Rock Island and Pacific Railroad Co., (July 24, 1974). The Court first quoted Powell v. U.S., 300 U.S. 276 (1937) for the proposition that Section 1(20) of the Act "provides the only method for enforcing §1(18)". The Court explained that "the rationale of primary jurisdiction has no application" because "there are no issues requiring the views of the administrative agency":

> "The only question for resolution is whether there has been an abandonment within the intendment of §1(18). This is a legal question for the courts to determine" (p. 9)

The Commission itself feels that it lacks jurisdiction to grant relief to a shipper disadvantaged by an unauthorized abandonment effected by means of an embargo. This is demonstrated by the Commission's institution of the present court action. Furthermore, in Alco-Gravure, Inc. v. Baltimore & Annapolis R.R. Co. (September 17, 1974) the Commission held that it lacked jurisdiction to prevent an embargo-type abandonment which a railroad customer alleged was in violation of

§1(18). The Commission held that the procedure of the instant case should be followed and the matter referred to the Commission's Bureau of Enforcement "to file a court action against the defendant". Accordingly, had the Court below granted Maine Central's request to refer the matter to the Commission, Ethan Allen and the other intervening plaintiffs would have been totally without remedy.

III

The Equities Favored the Granting of an Injunction

Maine Central states that a court, in determining whether to grant an injunction under Section 1 of the Act, must examine the relative equities. The court below has done so, and has concluded that the equities favor the granting of an injunction. As will presently be discussed, there is ample support for this conclusion and the lower court's exercise of discretion should be sustained here.

In the usual proceeding of this nature, weighing

the equities means, essentially, that the cost to the railroad of restoring the segment must be compared with the cost to the public of doing without rail service. Here, however, no such comparison is necessary. The railroad's principal customer, Ethan Allen, has undertaken to pay the entire cost of rehabilitation. As previously mentioned, Maine Central estimates this to be $52,000, and the order appealed from expressly requires Ethan Allen to make such payment. The only expense which Maine Central may incur will be the cost of operating the segment until Commission disposition of the abandonment application. This, however, should not be a factor here. Had it not been for the flood of July, 1973, Maine Central would have had to bear the cost of operation from that date to the present time and it would continue to do so until disposition of the abandonment application. Maine Central, in other words, has benefited from an Act of God for fourteen months, and it is still trying to do so.

Maine Central argues that the equities are in its favor because the Commission delayed fixing a hearing date on the abandonment application. The parties are in agreement,

however, that such delay has resulted solely from the impact of the National Environmental Policy Act. In Harlem Valley Transportation Association v. Stafford 360 F. Supp. 1057 (S.D. N.Y. 1973) the District Court had held that an abandonment hearing must be preceded by, in effect, an environmental survey. The Commission - as it had every right to do - appealed that determination to this Court which on June 18, 1974 upheld the District Court. Almost a year was consumed during the course of this appeal. Thereafter, the Commission turned to the task of complying with the judicial interpretation of NEPA. The Environmental Threshold Assessment Survey ("Survey") issued in connection with Maine Central's abandonment application (attached to Appellant's Brief) is one of the results. The Commission concluded that here no environmental impact statement need be issued, and Maine Central's application presumably will be set for hearing momentarily.

The Commission had, in other words, a perfectly valid reason for delaying the Maine Central and other abandonment applications. Maine Centrals Brief refers to "the

Commission's ill-conceived policy of resisting the plain meaning of NEPA". (p. 8) This is an exageration, to say the least. Judge Friendly in the Bush Terminal Railroad litigation described the statute as "opaque". City of New York v. United States F. Supp. , (E.D. N.Y.) Before assuming an onerous enforcement role, clarification of the Commission's duties made obvious sense.

Furthermore, it is difficult to see how Maine Central has been hurt by delay in processing its application. Had the Commission started the present action in July of 1973, and had Maine Central been required to operate the segment during the intervening fourteen months, a different situation might be presented. But the Commission delayed instituting this action and, although Maine Central, for some reason, complains about such delay, the effect - combined with the present appeal - has been to minimize the impact on Maine Central. Service has still not been resumed, and apparently a Commission hearing will be held presently.

Maine Central also argues that the injunction appealed

from is inequitable because the abandonment application is certain to be granted. (In this connection Maine Central's Brief says that "the ICC has itself conceded probable grant of the pending petition in the near future". (p. 2.) This assertion is wholly undocumented, and it is unbelievable that the Commission would prejudge a matter which it has not yet heard.)

Ethan Allen is a protestant in the abandonment proceeding. So are the regulatory agencies in the two States involved: New Hampshire Public Utilities Commission and Vermont Public Service Board.

None of these protestants regard the outcome of the abandonment hearing as forordained. As far as Ethan Allen is concerned, its willingness to pay the $52,000 cost of rehabilitation is pragmatic evidence that it does not believe abandonment will be the outcome of the Commission's proceeding.

It is true that, with the loss of St. Regis Paper Company as a customer, the segment may not be a profitable

operation*. But this does not mean that the Commission will authorize abandonment of the segment. Where a railroad's entire operation is profitable the Commission may require retention of an unprofitable segment if there is substantial public interest in its continuation. This could well be the case here.

Maine Central's solvency is unquestioned. So is the importance of rail service to Ethan Allen. Again, Ethan Allen's willingness to spend $52,000 is pragmatic evidence.

Maine Central argues that there are "no public interest factors justifying grant of an injunction". (p. 2) This is nonsense. Ethan Allen is a member of the public, and the court below found (p. 6) that the use by it of trucks rather than railroad, results in increased transportation costs of at least $100,000 a year. Moreover, the testimony of Marshall Ames, Manager of Ethan Allen's Beecher Falls

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* In respect of the loss of the St. Regis traffic the Survey states: "Unsatisfactory service and failure to supply adequate cars were cited as reasons for the shift." (p. 6)

plant shows that the plant was built with a view to being serviced principally by rail. It is interesting that the segment here involved has been unlawfully abandoned for so long that concrete determinations can be made of the added cost of using motor carriers. In the usual abandonment proceeding, an estimate must be made in respect of this factor.

Moreover, Clinton Walker, President of Ethan Allen, testified that the Beecher Falls plant, which has undergone a steady growth in the past, could not be expected to expand further without rail service. Also, he pointed out that production at Ethan Allen's other New England plants is related to the Beecher Falls plant.

Maine Central professes to derive comfort from the Commission's "34-car rule". This recent regulation creates a rebuttable presumption in favor of abandonment if the annual volume of traffic on a segment is less than that number of cars annually. The annual volume of traffic, however, on the 23 mile Beecher Falls segment is well in excess of 34 cars per mile

and Maine Central can invoke the presumption only by looking to the entire 58 miles involved in the abandonment proceeding. This, however, makes little sense because most of the remaining 35 miles is now operated by either Boston & Maine or Canadian National, and, as the Survey shows, all of it will be so operated if Maine Central is authorized to abandon operation of the 35 miles of line south of Beecher Falls.

Maine Central also asserts, as an equity in its favor, that to repair the Beecher Falls branch "draws on the railroad's limited equipment and manpower" (p. 11) Maine Central's Brief says that "the application of Maine Central's manpower and equipment to repair of the embargoed segment precludes maintenance of other lines that are not marginal" (p. 23) This is disingenuous. The major rehabilitation work on the Beecher Falls segment is being performed by independent contractors with outside labor. This is evident from the bi-weekly progress reports which the court below required Maine Central to submit. The lower court's order was entered on July 18 but, as the Survey shows (p. 3), work did not commence until August 13. This delay resulted principally

from the time required to obtain competitive bids, prepare and execute construction contracts, verify the independent contractor's insurance, and engage in numerous other activities that would have been unnecessary if Maine Central had done the rehabilitation work entirely by itself.*

It would seem appropriate to point out here that there has been inordinate delay by Maine Central in rehabilitating the Beecher Falls segment. As the lower court indicated, Maine Central originally estimated that it would cost $30,000 to restore the segment to operating condition and that it would take "eight to ten working days" (p. 5). Later, Maine Central increased its estimated cost to $52,000. Assuming a corresponding increase in the time required, rehabilitation should require no more than 17 days. Actually,however, more

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* It is apparent that Maine Central's Brief must be read with extreme care. As another example, Maine Central says that if the Commission had approached it before filing suit "it might have been possible to arrange for substitute service pending decision on the merits of the abandonment petition" (p. 13). It is impossible to envision "substitute service". Maine Central's line terminates at Beecher Falls which is served by no other railroad.

than two months have elapsed, and the rehabilitation still is not completed. The last progress report, filed with the court below on September 12, 1974, gives no indication that the work is even nearing completion. The rehabilitation appears to be proceeding so slowly that, if this Court affirms the decision below, Ethan Allen will have no alternative but to reopen the proceeding to see if rehabilitation cannot be expedited*.

Finally, mention should be made of Maine Central's argument that Ethan Allen has an adequate remedy at law for damages and no injunctive relief should therefore be granted (Brief, p. 11). This is an astonishing assertion. In the first place, this action was started by the Interstate Commerce Commission and the two State regulatory agencies intervened. They are entitled to relief whatever may be the situation as to Ethan Allen. Second, Maine Central's position that Ethan Allen may have a claim for damages is wholly contrary to the

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* The progress reports tend to be uninformative since they do not show the amount of manpower, absolutely or relatively, employed in rehabilitation of the segment.

position taken by Maine Central in the court below. At page 9 of its memorandum of law Maine Central there contended that injunctive relief is Ethan Allen's sole remedy under the Act, and that Ethan Allen has no claim for damages. This argument has not yet been passed on by the court below. Maine Central did not, of course, assert in the court below that Ethan Allen should be denied injunctive relief because of its claim for damage. Maine Central should not be allowed to do so here.

Third, Maine Central certainly is aware that a likely outcome of this dispute may be the acquisition of the segment by New Hampshire or by a short-line operator. Two railroad abandonment proceeding involving Vermont railroads have been so resolved. Obviously, the likelihood of such an acquisition here is greatly enhanced if the segment is rehabilitated and restored to operation by Maine Central. This underscores the need for the relief granted by the court below and shows convincingly that money damage alone will not suffice.

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I served all parties to this appeal with copies of the Brief of Ethan Allen, Inc. by air mail, postage prepaid, on September 24, 1974:

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